

ORDINANCE NO. 2493

**AN ORDINANCE OF THE CITY OF FREMONT AMENDING
CHAPTER 2 (ZONING) OF TITLE VIII (PLANNING AND ZONING)
OF THE FREMONT MUNICIPAL CODE TO ADD A NEW ARTICLE
21.7 (INCLUSIONARY HOUSING) TO HELP MEET THE CITY OF
FREMONT'S AFFORDABLE HOUSING NEEDS (PLN2003-00088)**

Section 1. Article 21.7 (Inclusionary Housing) of Chapter 2 (Zoning), Title VIII (Planning and Zoning) of the Fremont Municipal Code is added to and amended to read as follows:

Section 8-22170. Basis and Purposes.

In enacting this ordinance, the City finds as follows:

- (a) Rental and owner-occupied housing in the City has become steadily more expensive. Housing costs have gone up faster than incomes for many groups in the community.
- (b) Many persons who work in the City, who have grown up or have family ties in the City, who already live in the City but must move, or who wish to live in the City for other reasons, cannot afford housing in the City.
- (c) Federal and State government programs do not provide nearly enough affordable housing or subsidies to satisfy the housing needs of moderate, lower or very low income households.
- (d) Rising land prices have been a key factor in preventing development of new affordable housing. New housing construction in the City which does not include affordable units aggravates the existing shortage of affordable housing by absorbing the supply of available residential land. This reduces the supply of land for affordable housing and increases the price of remaining residential land. At the same time new housing contributes to the demand for goods and services in the City, increasing local service employment at wage levels which often do not permit employees to afford housing in the City. Providing the affordable units required by this ordinance will help to insure that part of the City's remaining developable land is used to provide affordable housing.

(e) The City wishes to retain an economically balanced community, with housing available to very low income, lower income and moderate income households. The City's General Plan implements the established policy of the State of California that each community should foster an adequate supply of housing for persons at all economic levels.

(f) An economically balanced community is only possible if part of the new housing built in the City is affordable to households with limited incomes. Requiring builders of new housing to include some housing affordable to households at a range of incomes is fair, not only because new development without affordable units contributes to the shortage of affordable housing but also because zoning and other ordinances concerning new housing in the City should be consistent with the community's goal to foster an adequate supply of housing for persons at all economic levels.

(g) In general, affordable units within each housing development would serve the goal of maintaining an economically balanced community. Construction of required units off-site may be appropriate in some cases, but should be allowed only where a project sponsor demonstrates satisfaction of the criteria set forth in this ordinance.

Section 8-22171. Definitions.

(a) Affordable ownership cost. Average monthly housing payments, during the first calendar year of a household's occupancy, including property taxes, homeowners insurance and homeowners association dues, if any, which are equal to or less than one-twelfth (1/12) of thirty-five percent (35%) of the maximum annual household income allowed for the affordable unit. Maximum annual household income shall be set based on presumed occupancy levels of one person in a studio apartment, two (2) persons in a one (1) bedroom unit, three (3) persons in a two bedroom unit and one additional person for each additional bedroom thereafter.

(b) Affordable rent. Monthly rent, including utilities and all fees for housing services, equal to or less than one-twelfth (1/12) of thirty percent (30%) of the maximum annual household income allowed for the affordable unit. Maximum annual household income shall be set based on presumed occupancy levels of one person in a studio apartment, two (2) persons in a one (1) bedroom unit, three (3) persons in a two (2) bedroom unit, and one additional person for each additional bedroom thereafter.

(c) Affordable units. Living units which are required under this chapter to be rented at affordable rents or available at an affordable housing cost to specified households.

(d) Area median income. Area median income as published pursuant to California Code of Regulations, Title 25, Section 6932 (or its successor provision).

(e) Construction cost index. The Engineering News Record San Francisco Building Cost Index. If that index ceases to exist, the City Manager shall substitute another construction cost index which in his or her judgment is as nearly equivalent to the original index as possible.

(f) Consumer Price Index. The U.S. Department of Labor, Bureau of Labor Statistics Consumer Price Index for All Urban Consumers for the San Francisco-Oakland-San Jose Metropolitan Statistical Area or if that index is discontinued, a successor index selected by the City Manager.

(g) Eligible household. A household whose household income does not exceed the maximum specified in Section 8-22175 for a given affordable unit.

(h) First approval. The first of the following approvals to occur with respect to a residential project: planned district approval, subdivision approval, conditional use permit, building permit.

(i) For-sale project. A residential project, or portion thereof, which is intended to be sold to owner-occupants upon completion.

(j) Household income. The combined adjusted gross income for all adult persons living in a living unit as calculated for the purpose of the Section 8-22177 program under the United States Housing Act of 1937, as amended, or its successor

(k) Living unit. One or more rooms designed, occupied, or intended for occupancy as separate living quarters, with cooking, sleeping, and bathroom facilities.

(l) Market rate units. New living units in residential projects which are not affordable units under subdivision (c) of this section.

(m) Pending project. A project for which no later than January 25, 2003, the date thirty days after the effective date of this chapter, either: (1) a subdivision map application or other development application, other than a general plan amendment application, zoning text amendment application or Preliminary Review Process (PRP) application, has been filed with and deemed complete by the City, if the living units constructed pursuant to that

application are the same number as proposed in the original application, or (2) as of November 12, 2002, a general plan amendment application has been filed with and found complete by the City and is being diligently pursued by the applicant, and the applicant has executed an irrevocable written commitment to the City that at least ten percent (10%) of the living units in the project will meet the requirements for affordable units under this chapter.

(n) Published standard. The standard for a specified income level for Alameda County, as published pursuant to California Code of Regulations, Title 25, Section 6932 (or its successor provision).

(o) Rental project. A residential project, or portion thereof, which is intended to be rented to tenants upon completion.

(p) Residential project. Any planned district, subdivision map, conditional use permit or other discretionary City land use approval which authorizes seven or more living units or residential lots, or living units and residential lots which total seven or more in combination. In order to prevent evasion of the provisions of this chapter, contemporaneous construction of seven or more living units on a lot, or on contiguous lots for which there is evidence of common ownership or control, even though not covered by the same City land use approval, shall also be considered a residential project. Construction shall be considered contemporaneous for all units which do not have completed final inspections for occupancy and which have outstanding, at any one time, any one or more of the following: planned district, subdivision map, conditional use permit or other discretionary City land use approvals, or building permits, or applications for such an approval or permits. A pending project shall not be considered a residential project under this chapter.

Section 8-22172. Basic Requirement.

(a) At least fifteen percent (15%) of all residential units in any residential project shall be made available at affordable rents or affordable housing cost as prescribed in Section 8-22175 and shall be approved and completed not later than the times prescribed in Section 8-22174, unless one of the alternative actions set forth in Section 8-22177 is performed. For purposes of calculating the number of affordable units required by this section, any additional units authorized as a density bonus pursuant to California

Government Code Section 65915(b)(1) or (b)(2) shall not be counted as part of the residential project. For fractions of units in residential projects which contain more than 20 living units, where the fraction is .6 or greater, the owner of the property must construct the next higher whole number of affordable units, and where the fraction is less than .6, the owner may construct the next lower whole number of affordable units. For fractions of units in residential projects which contain 20 units or less, the fraction shall be disregarded in calculating the number of affordable units required.

(b) This chapter is not intended to authorize the City to require affordable units or other measures to further affordable housing beyond those specified by its provisions. The City may require additional affordable units or additional measures to further affordable housing, but only to the extent it has authority to do so without respect to this chapter.

(c) Notwithstanding any other provision of this chapter, the requirements of this chapter shall be waived, adjusted or reduced if the applicant shows that there is no reasonable relationship between the impact of a proposed residential project and the requirements of this chapter, or that applying the requirements of this chapter would take property in violation of the United States or California Constitution. To receive a waiver, adjustment or reduction under this subsection (c), the applicant must make a showing under this subsection when applying for a first approval for the residential project, and/or as part of any appeal which the City provides as part of the process for the first approval.

Section 8-22173. Incentives.

Residential projects which comply with this chapter may elect the following:

(a) Subject to Section 8-22175(c) and subject in each case to the approval of the City Manager or the Manager's designee, affordable units in a for-sale project may be smaller in aggregate size and have different interior finishes and features than market-rate units in the same residential project (so long as the finishes and features are durable, of good quality and consistent with contemporary standards for new housing).

(b) In a residential project which contains single-family detached homes, affordable units may be attached living units rather than detached homes, and in a

residential project which contains attached multi-story living units, affordable units may contain only one story.

(c) As stated in Section 8-22172(a), in calculating the number of affordable units required by this chapter, any additional units authorized as a density bonus pursuant to California Government Code Section 65915(b)(1) or (b)(2) shall not be counted as part of the residential project.

Section 8-22174. Time Performance Required.

(a) No building permit shall be issued for any market rate unit until the permittee has obtained permits for affordable units sufficient to meet the requirements of Section 8-22172, or received certification from the City Manager or the Manager's designee that the permittee has met, or made arrangements satisfactory to the City to meet, an alternative requirement of Section 8-22177. No final inspection for occupancy for any market rate unit shall be completed until the permittee has constructed the affordable units required by Section 8-22172 or completed corresponding alternative performance under Section 8-22177.

(b) Conditions to carry out the purposes of this chapter shall be imposed on the first approval for a residential project. Additional conditions may be imposed on later City approvals or actions, including without limitation planned district approvals, subdivision approvals, conditional use permits and building permits.

Section 8.22175. Requirements for Affordable Units.

(a) The affordable units which are constructed in rental projects shall be offered for rent at affordable rents exclusively to households whose income does not exceed the published standard for lower income households, adjusted for household size. Of these affordable units in rental projects, sixty percent (60%) of the required 15%, or 9% of the total units in the project, shall be offered at affordable rents exclusively to households whose income does not exceed the published standard for very low income households, adjusted for household size, provided that where this requirement for very low income units would result in a fraction of a very low income unit, the number of very low income units

shall be rounded down and the number of lower income units which need not be very low income units shall be rounded up.

(b) The affordable units which are constructed in for-sale projects shall be sold at affordable housing cost for owner-occupancy to households whose income does not exceed one hundred and ten percent (110%) of area median income, adjusted for household size, or offered for rent pursuant to the terms of Section 8-22177(a), provided that such units may be sold at affordable housing cost for owner-occupancy to households whose income does not exceed one hundred and twenty percent (120%) of area median income when the City Manager, or the Manager's designee determines that is necessary to secure households able to qualify for mortgages to purchase the units.

(c) Subject to Section 8-22177(a), affordable units shall be comparable in overall number of bedrooms, proportion of units in each bedroom category, quality of exterior appearance and overall quality of construction to market rate units in the same residential project. Interior features and finishes in affordable units shall be durable, of good quality and consistent with contemporary standards for new housing. Affordable units shall be dispersed throughout the residential project in a manner acceptable to the City.

Section 8-22176. Continued Affordability; City Review of Occupancy.

(a) Regulatory agreements acceptable to the City Manager or the Manager's designee and, if the affordable units are designated for owner occupancy, resale restrictions, deeds of trust and/or other documents acceptable to the City Manager or the Manager's designee, all consistent with the requirements of this chapter, shall be recorded against affordable owner-occupied units and residential projects containing affordable rental units. These documents shall, in the case of affordable units which are initially rented, be for a term of 99 years (or, if shorter, for so long as the project remains standing) and in the case of affordable units which are initially sold, be for a term of 30 years. In the case of affordable owner-occupied units which are transferred during the required term, renewed restrictions shall be entered into on each change of ownership, with a 30 year renewal term. The forms of regulatory agreements, resale restrictions, deeds of trust and other documents authorized by this subsection, and any change in the form of any such document which

materially alters any policy in the document, shall be approved by the City Manager or his or her designee prior to being executed with respect to any residential project.

(b) In the case of units which are initially owner-occupied, the documents required by subsection (a) may not authorize subsequent rental occupancy on terms other than those provided in Section 8-22175(b) or 8-22175(c). For rented affordable units, the documents required by subsection (a) shall provide for continued occupancy for limited periods by households occupying the units, whose incomes increase during their occupancy so that they exceed the maximum otherwise permitted for the unit.

(c) The maximum sales price permitted on resale of an affordable unit designated for owner-occupancy shall be the lower of: (1) fair market value or (2) the seller's lawful purchase price, increased by the lesser of (A) the rate of increase of area median income during the seller's ownership or (B) the rate at which the Consumer Price Index increased during the seller's ownership. The documents required by subsection (a) may authorize the seller to recover the market value at time of sale of capital improvements made by the seller and the seller's necessary costs of sale and may authorize an increase in the maximum allowable sales price to achieve such recovery. The resale restrictions shall allow the City a right of first refusal to purchase any affordable owner-occupancy unit at the maximum price which could be charged to a purchaser household, at any time the owner proposes sale.

(d) No household shall be permitted to begin occupancy of a unit which is required to be affordable under this chapter unless the City or its designee has approved the household's eligibility, or has failed to make a determination of eligibility within the time or other limits provided by a regulatory agreement or resale restrictions. If the City or its designee maintains a list of, or otherwise identifies, eligible households, initial and subsequent occupants of affordable units shall be selected first from the list or identified households, to the maximum extent possible, in accordance with rules approved by the City Manager or the City Manager's designee. If the City has failed to identify an eligible buyer for initial sale of an affordable unit which is intended for owner-occupancy ninety days after the unit receives a completed final inspection for occupancy, upon ninety additional days' notice to the City and on satisfaction of such further conditions as may be included in City-approved restrictions (which may include a further opportunity to identify an eligible

buyer), the owner may sell the unit at a market price, and the unit shall after such a sale not be subject to any requirement of this chapter.

Section 8-22177. Alternatives to On-Site Construction.

An applicant may elect, in lieu of building affordable units within a residential project, if the criteria stated in the relevant subsection below are satisfied in connection with and as part of the first approval for the residential project, to either:

(a) Rental Units in For-Sale Projects. Where owner-occupied affordable units are required by Section 8-22175(b), instead construct as part of the residential project the same or a greater number of rental units, affordable to lower and very low income households and at rents as prescribed in Section 8-22175(a). Substitution of rental units shall be allowed under this subsection only if either: (1) the rental units are at least equal in number of bedrooms to the owner-occupancy units which would have been allowed, or (2) any comparative deficiency in bedrooms is compensated for by additional units and/or affordability to households with lower incomes.

(b) Off-Site Construction. Construct, or make possible construction by another developer of, units not physically contiguous to the market-rate units and equal or greater in number to the number of affordable units required under Section 8-22174. Off-site construction pursuant to this subsection shall be approved only if:

(1) Approval has been secured for the off-site units not later than the time the residential project is approved and completion of the off-site units is secured by a requirement that final inspections for occupancy for the related market-rate units be completed after those for the affordable units;

(2) The off-site units will be greater in number, larger or affordable to households with lower incomes than would otherwise be required in Section 8-22172;

(3) Financing or a viable financing plan is in place for the off-site units;
and

(4) In the event the off-site units receive any public assistance, the developer of the residential project will contribute to the off-site units economic value equivalent to the value of making on-site units in the developer's residential project affordable.

The City may require that completion of off-site units shall be further secured by the developer's agreement to pay an in-lieu fee in the amount due under subsection (d) in the event the off-site units are not timely completed.

(c) Land Dedication. Dedicate without cost to the City, a lot or lots within or contiguous to the residential project, sufficient to accommodate at least the required affordable units for the residential project. An election to dedicate land in lieu of compliance with other provisions of this chapter shall be allowed only if:

(1) The value of the lot or lots to be dedicated is sufficient to make development of the otherwise required affordable units economically feasible, and financing or a viable financing plan is in place for at least the required number of affordable units and;

(2) The lot or lots are suitable for construction of affordable housing at a feasible cost, served by utilities, streets and other infrastructure and there are no hazardous material or other material constraints on development of affordable housing on the lot or lots; and

(d) In-Lieu Fee. To the extent the residential project consists of for-sale units on lots whose average size is 10,000 square feet or more, on a site designated residential low density, residential very low density or open space by the general plan, pay an in-lieu fee.

(1) Fees shall be paid upon issuance of building permits for market-rate units in a residential project. If building permits are issued for only part of a residential project, the fee amount shall be based only on the number of units then permitted.

(2) The initial fee schedule shall be set by the City fee resolution or other action of the City Council so that the fee amounts are sufficient to make up the gap between: (i) the amount of development capital typically expected to be available based on the amount to be received by a developer or owner from affordable housing cost or affordable rent, and (ii) the anticipated cost of prototypical affordable units.

(3) The City Council may annually review the fee authorized by this subsection (d) by resolution, and may, based on that review, adjust the fee amount. For any annual period during which the Council does not review the fee authorized by this subsection, fee amounts shall be adjusted once by the City Manager or the Manager's designee based on the construction cost index. Where payment is delayed, in the event of

default or for any other reason, the amount of the in-lieu fee payable under this subsection (d) shall be based upon the fee schedule in effect at the time the fee is paid.

(4) No final inspection for occupancy shall be completed for any corresponding market-rate unit in a residential project unless fees required pursuant to this chapter shall have been paid in full to the City.

Section 8-22178. Use and Expenditure of Fees.

(a) All fees collected under this chapter shall be deposited into a separate account to be designated the City of Fremont Housing Trust Fund.

(b) The fees collected under this chapter and all earnings from investment of the fees shall be expended exclusively to provide or assure continued provision of affordable housing in the City through acquisition, construction, development assistance, rehabilitation, financing, rent subsidies or other methods, and for costs of administering programs which serve those ends. The housing shall be of a type, or made affordable at a cost or rent, for which there is a need in the City and which is not adequately supplied in the City by private housing development in the absence of public assistance.

Section 8-22179. Enforcement.

(a) The City Attorney shall be authorized to enforce the provisions of this chapter and all regulatory agreements and resale controls placed on affordable units, by civil action and any other proceeding or method permitted by law.

(b) Failure of any official or agency to fulfill the requirements of this chapter shall not excuse any applicant or owner from the requirements of this chapter.

Section 2. Severability.

If any clause, sentence, section, or part of this chapter, or any fee or requirement imposed upon any person or entity, is found to be unconstitutional, illegal, or invalid, such unconstitutionality, illegality, or invalidity shall affect only such clause, sentence, section or part, or such person or entity, and shall not affect or impair any of the remaining provisions, clauses, sentences, sections, or parts or the effect of this chapter on other persons or entities. It is hereby declared to be the intention of the City Council that this chapter would have been adopted had such unconstitutional, illegal, or invalid clause, sentence, section, or part

not been included herein, or had such person or entity been expressly exempted from the application of this chapter.

Section 3. Effective Date.

This ordinance shall be published once in The Argus, a newspaper of general circulation printed and published in Alameda County and circulated in the City of Fremont, within fifteen (15) days from and after its adoption, and shall take effect and be enforced thirty (30) days after its adoption.

The foregoing ordinance was duly introduced before the City Council of the City of Fremont, County of Alameda, at the meeting of the City Council of such City, held on the 12th day of November 2002, and finally adopted at a regular meeting of said Council held on the 26th day of November 2002, by the following vote, to wit:

AYES: Mayor Morrison, Vice Mayor Zlatnik, Councilmembers Wasserman, Pease and Cho

NOES: None

ABSTAINED: None

ABSENT: None

GUS MORRISON

Mayor

ATTEST:

APPROVED AS TO FORM:

RENEE ELLIOTT

Deputy City Clerk

HARVEY E. LEVINE

City Attorney